

NUNC PRO TUNC

FILED

SEP 10, 2008

IN THE U.S. DISTRICT COURT

2008 SEP 12 AM 11:27

SOUTHERN DISTRICT OF CALIFORNIA CLERK US DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

OFFICE OF THE COURT CLERK

BY RAM DEPUTY

IN RE, ERIC W. BURTON # F02720

CASE NO: 08-cv-0325 LAB (PAR)

ON FED.H.C., PETITIONER,

DATE: 9-4-08

U. DIRECTOR OF THE C.D.C.R.

TIME 0900

RESPONDENT

NOTICE OF CLARIFICATION, AND

NOTICE AND MOTION FOR LEAVE TO

AMEND PETITIONER'S "FIRST" "TINELY"

FILED RULE 60(B) MOTION TO

ABATE THE DISMISSAL CONTRA

OF HIS FIRST TIMELY AND

PROPERLY FILED FED.H.C.

PETITION, FILED ON OR NEAR

2-08-08 IN THE U.S. DISTRICT

COURT, EASTERN CA. DISTRICT,

THE CORRECT JURISDICTION

OF WHERE PETITIONER IS INCARCER-

ATED, AND TRANSFERRED ON OR NEAR

2-19-08, TO THE U.S. DISTRICT

COURT, SOUTHERN DISTRICT OF CA.

"PROPERLY FILED" PURSUANT TO ARTUZ

V. BENNETT, 529 U.S. 1065 (2000);

GONZALEZ V. CROSBY (U.S. 2005) 545 U.S. 524;

CIVIL RULE 15(q) "LEAVE SHALL BE FREELY

GIVEN WHEN JUSTICE SO REQUIRES".

REQUEST COURT OPEN NOTICE TO ALL PARTIES.

BASED ON MEMORANDUM AND POINTS OF AUTHORITIES IN SUPPORT THEREOF.

1. NOTICE IS HEREBY GIVEN TO THE U.S. DISTRICT COURT, SOUTHERN CA. DISTRICT,
2. RESPONDENT, AND ALL PARTIES INVOLVED IN THE INSTANT MATTER.

3. STATEMENT OF FACTS

4. ON OR NEAR 8-25-08, PETITIONER, E.W. BURTON #FO2720, A PROSE,
5. UNCONSTITUTIONALLY INCARCERATED, INDIGENT STATE PRISONER, UNTRAINED
6. IN LAW OR IT'S PRACTICES, FILED A MOTION FOR LEAVE TO AMEND OR
7. WITHDRAW WITHOUT PREJUDICE, HIS TIMELY FILED "FIRST RULE GO(B)"
8. MOTION FILED, AND TIMELY SERVED ON THE U.S. DISTRICT COURT, SOUTHERN
9. CA. DISTRICT ON OR NEAR 5-29-08, BY THE PETITIONER VIA THE NINTH
10. CIRCUIT CLERK, TO ABATE THE DISMISSAL CONTRA, OF PETITIONER'S
11. TIMELY, AND PROPERLY FILED "FIRST FED. H.C." PETITION, AS THE DISTRICT
12. COURT DISMISSED THE "APPLICATION" AS PROCEDURALLY BARRED, OF
13. WHICH REASONABLE JURISTS WOULD FIND IT DEBATABLE WHETHER
14. THE U.S. DISTRICT COURT WAS CORRECT IN IT'S PROCEDURAL RULING.
15. IN LIGHT OF THE PETITION BEING PROPERLY FILED "PURSUANT TO ARTUZ
16. V. BENNETT 529 U.S. 1065. (531 U.S. 4) (2000), THAT AN APPLICATION FOR
17. STATE POST CONVICTION RELIEF CAN BE "PROPERLY FILED" EVEN IF THE
18. STATE COURTS DISMISS IT AS PROCEDURALLY BARRED. ON OR NEAR 8-25-
19. 08, PETITIONER FILED A NOTICE AND MOTION FOR LEAVE TO AMEND OR
20. WITHDRAW W/O PREJUDICE HIS "FIRST UNRAuled" RULE GO(B) MOTION,
21. PETITIONER DOES "NOT" WISH TO WITHDRAW THE MOTION AS
22. "CLARIFICATION"- BUT RESPECTFULLY REQUEST LEAVE TO
23. AMEND THE MOTION PURSUANT TO CIVIL RULE 19(q), THIS MOTION IS
24. TIMELY, AND THE DISTRICT COURT HAS THE BROAD POWERS TO ALLOW
25. THE PETITIONER TO CURE THE DEFICIENCY, AS PROCEDURALLY
26. A RULE GO(B) MOTION TOLLS AEDPA, STATUTES OF LIMITATIONS TIMES
27. 1YEAR, AS PETITIONER RECENTLY BECAME AWARE THAT THE FILING
28. OF A PETITION FOR HABEAS CORPUS IN FEDERAL COURT DOES NOT

BUATON, E.W. #FO2720
 P.O. BOX 5246-CSATF/SP CI-119L
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 IN PROPER

1 TOLL THE STATUTE OF LIMITATIONS FOR FEDERAL HABEAS RELIEF,
 2 28 U.S.C.A. § 2244(d), AND THE COURT HAD PREVIOUSLY DENIED
 3 PETITIONER'S MOTION FOR A STAY AND ABEYANCE, PRIOR TO HIS
 4 TIMELY AND PROPERLY FILED "FIRST AMENDED" PETITION, ALTHOUGH
 5 THE CASE HAS BEEN REOPENED, PETITIONER WHO MAY OR MAY
 6 NOT BE GRANTED RELIEF, WOULD STILL LIKE TO EXERCISE HIS
 7 APPELLATE RIGHTS FOR THE CONTRARY DISMISSAL AND FAILURE OF
 8 THE DISTRICT COURT TO REACH THE MERITS OF HIS "FIRST
 9 PROPERLY, AND TIMELY FILED FED. H.C. PETITION FILED VIA PRISON LEGAL
 10 MAIL ON OR NEAR 2-03-08 IN THE U.S. DISTRICT COURT, EASTERN DISTRICT
 11 OF CA, THE CORRECT JURISDICTION WHERE PETITIONER IS INCARCERATED,
 12 AS REASONABLE JURISTS WOULD FIND IT DEBATABLE WHETHER THE
 13 FILING OF THE FIRST FED. H.C. PETITION IN THE DISTRICT WHERE
 14 PETITIONER IS INCARCERATED WAS CORRECT UNDER 28 U.S.C 2254
 15 PROCEDURAL RULES, AND WHETHER THE U.S. DISTRICT COURT FOR THE
 16 SOUTHERN CA. DISTRICT WAS CORRECT IN THEIR PROCEDURAL RULING,
 17 AND FAILURE TO REACHED THE MERITS OF PETITIONER'S "FIRST PROPERLY
 18 AND TIMELY FILED FEDERAL HABEAS CORPUS PETITION FILED IN THE U.S.
 19 DISTRICT COURT FOR THE SOUTHERN CA. DISTRICT ON OR NEAR 2-19-08,
 20 VIA TRANSFER FOR THE U.S. DISTRICT, EASTERN CA. DISTRICT.
 21 PURSUANT TO GONZALEZ V. CROSBY (U.S. 2005) 545 U.S. 524, 125 S.Ct. 2641,
 22 WHICH HELD: A MOTION FOR RELIEF FROM JUDGMENT, CHALLENGING
 23 ONLY DISTRICT COURT'S PRIOR RULING THAT HABEAS PETITION WAS
 24 TIME-BARRED, WAS NOT THE EQUIVALENT OF A "SECOND OR SUCCESSIVE
 25 PETITION", AND REQUIRED FOR PETITIONER TO PREVAIL IN MOTION TO VACATE,
 26 AS A TEXTUAL MATTER, THE PROVISION OF THE ANTITERRORISM AND
 27 EFFECTIVE DEATH PENALTY ACT (AEDPA) GOVERNING SECOND OR SUCCESSIVE
 28 HABEAS PETITIONS APPLIES ONLY WHERE THE COURT ACTS PURSUANT

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IN PROPER

1 TO A PRISONER'S APPLICATION FOR A WRIT OF HABEAS CORPUS,
2 28 U.S.C. 2244(b)

3 ARGUMENT

4 SEE GONZALEZ V. CROSBY, 545 U.S. 524, 125 S.Ct. 2641 (U.S. 2005) WE
5 HOLD THAT A RULE 60(b)(6) MOTION IN A § 2254 CASE IS NOT TO BE
6 TREATED AS A SUCCESSIVE HABEAS PETITION IF IT DOES NOT
7 ASSERT, OR REASSERT, CLAIMS OF ERROR IN THE MOVANT'S STATE
8 CONVICTION. A MOTION THAT LIKE PETITIONER'S, CHALLENGES
9 ONLY THE DISTRICT COURT'S FAILURE TO REACH THE MERITS
10 DOES NOT WARRANT SUCH TREATMENT, AND CAN THEREFORE
11 BE RULED UPON BY THE DISTRICT COURT WITHOUT PRECERTIFICATION
12 BY THE COURT OF APPEALS PURSUANT TO § 2244(b)(3).

13 WHEREFORE PETITIONER RESPECTFULLY MOVES THIS COURT TO STAY HIS
14 "FIRST" RULE 60(B) MOTION FILED AND SERVED ON OR NEAR 5-29-08, WITH
15 LEAVE TO AMEND, AND THE "CLARIFICATION" NOT TO WITHDRAW THE
16 MOTION, IN THE FAIR ADMINISTRATION OF JUSTICE, TO CORRECT THE
17 ERRORS IN THE MOTION AS SO REFLECTED BY THE LIGHT OF THIS
18 PRESENT MOTION, PURSUANT TO CIVIL RULE 15(a), AND GONZALEZ V. CROSBY,
19 545 U.S. 524.

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IN PROPER

MEMORANDUM AND POINTS OF AUTHORITIES

1. CONALEZ V. CROSBY, 545 U.S. 524, 125 S.Ct. 2641 (U.S. 2005)
2. WE HOLD THAT A RULE 60(b)(6) MOTION IN A § 2254 CASE IS
3. NOT TO BE TREATED AS A SUCCESSIVE HABEAS PETITION
4. IF IT DOES NOT ASSERT, OR REASSERT, CLAIMS OF ERROR
5. IN THE MOVANT'S STATE CONVICTION. A MOTION THAT LIKE
6. PETITIONER'S, CHALLENGES ONLY THE DISTRICT COURT'S
7. FAILURE TO REACH THE MERITS DOES NOT WARRANT
8. SUCH TREATMENT, AND CAN THEREFORE BE RULED UPON
9. BY THE DISTRICT COURT WITHOUT PRECERTIFICATION
10. BY THE COURT OF APPEALS PURSUANT TO § 2244(b)(3).
11. SEE RHINES V. WEBER, ANTE 544 U.S. AT 208, 125 S.Ct. 1528, 1531, 161 L.Ed.
12. 2d. 440 (2005). A PETITIONER'S REASONABLE CONFUSION ABOUT
13. WHETHER A STATE FILING WOULD BE TIMELY WILL ORDINARILY
14. CONSTITUTE "GOOD CAUSE" FOR HIS FAILURE [125 S.Ct. 1814] TO EXHAUST
15. HIS UNEXHAUSTED CLAIMS ARE POTENTIALLY MERITORIOUS,
16. AND THERE IS NO INDICATION THAT THE PETITIONER ENGAGED
17. IN INTENTIONALLY [544 U.S. 417] DILATORY TACTICS, THEN THE
18. DISTRICT COURT LIKELY "SHOULD STAY, RATHER THAN DISMISS,
19. THE MIXED PETITION".
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1 JONES V. BARK, 549 U.S. 199, 127 S.Ct. 910 (U.S. 2007) (quoting); but
2 A COURT PRESENTED WITH A MIXED HABEAS PETITION
3 TYPICALLY "ALLOW[S] THE PETITIONER TO DELETE THE
4 UNEXHAUSTED CLAIMS AND TO PROCEED WITH THE
5 EXHAUSTED CLAIMS," RHINES V. WEBER, 544 U.S. 269, 278,
6 125 S.Ct. 1528, 161 L.Ed.2d 440.

7 FEDERAL RULE OF CIVIL PROCEDURE 8(a) REQUIRES SIMPLY
8 A "SHORT AND PLAIN STATEMENT OF THE CLAIM" IN A COMPLAINT,
9 AND PLRA CLAIMS ARE TYPICALLY BROUGHT UNDER 42 U.S.C.
10 § 1983, WHICH DOES NOT REQUIRE EXHAUSTION AT ALL.
11 THE FACT THAT THE PLRA DEALT EXTENSIVELY WITH
12 EXHAUSTION, BUT IS SILENT ON THE ISSUE WHETHER
13 EXHAUSTION MUST BE PLEDDED OR IS AN AFFIRMATIVE
14 DEFENSE, IS STRONG EVIDENCE THAT THE USUAL
15 PRACTICE SHOULD BE FOLLOWED, AND THE PRACTICE
16 UNDER THE FEDERAL RULES IS TO REGARD EXHAUSTION
17 AS AN AFFIRMATIVE DEFENSE, INCLUDING IN THE
18 SIMILAR STATUTORY SCHEME GOVERNING HABEAS
19 CORPUS, DAY V. McDONOUGH, 547 U.S. 198, 126 S.Ct. 1675,
20 164 L.Ed.2d 376.

21 OTHER CIRCUITS REJECT TOTAL EXHAUSTION ALTOGETHER,
22 INSTEAD DISMISSING ONLY UNEXHAUSTED CLAIMS
23 AND CONSIDERING THE REST ON THE MERITS. SEE, E.G.,
24 ORTIZ V. MC BRIDE, 380 F.3d 649, 663 (C.A. 22004),
25 ONLY INDIVIDUAL CLAIMS, AND NOT THE APPLICATION CONTAINING
26 THOSE CLAIMS, CAN BE PROCEDURALLY DEFAULTED UNDER STATE LAW
27 PURSUANT TO OUR HOLDINGS IN COLEMAN V. THOMPSON, 501 U.S. 722, 111 S.Ct.
28 2546, 115 L.Ed.2d 640 (1991), AND WAINWRIGHT V. SYKES, 433 U.S. 72, 975, 53 L.Ed. 594 (1977).

GIDEON V. WAINWRIGHT SUPRA (1963)

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2 07-159 NEWPORT NEWS, VA. V. SCIOLINO

3 EMPLOYEE'S - DISCHARGE - STIGMATIZING INFORMATION IN PERSONNEL FILE - NAME-
4 CLEARING HEARING.

5 RULING BELOW (4TH CIR., F.3d 642, 75 U.S.L.W. 1557, 25 I.E.R. (C.A.), 1402):

6 IN FORMER CITY EMPLOYEE'S 42 U.S.C. 1983 ACTION ALLEGING THAT
7 WHEN DISCHARGING HIM, CITY PLACED IN HIS PERSONNEL FILE FALSE
8 INFORMATION DAMAGING TO HIS GOOD NAME WITHOUT GRANTING
9 HIM NAME-CLEARING HEARING, DISTRICT COURT ABUSED IT'S
10 DISCRETION WHEN, AFTER DISMISSING COMPLAINT BECAUSE
11 FORMER EMPLOYEE FAILED TO ALLEGE FACTS ASSERTING
12 LIKELIHOOD THAT PROSPECTIVE EMPLOYERS OR MEMBERS OF
13 PUBLIC WOULD SEE FILE'S DAMAGING INFORMATION, IT DENIED
14 FORMER CITY EMPLOYEE'S MOTION TO AMEND HIS COMPLAINT
15 IN ORDER TO MEET THAT STANDARD.

16 QUESTION PRESENTED: WHEN GOVERNMENT EMPLOYER TAKES NO STEPS TO
17 PUBLICIZE REASONS FOR EMPLOYEE'S TERMINATION, BUT PLACES ALLEGEDLY
18 FALSE STIGMATIZING REASONS FOR TERMINATION IN EMPLOYEE'S PERSONNEL
19 FILE, DOES DUE PROCESS CLAUSE REQUIRE EMPLOYER TO PROVIDE
20 TERMINATED EMPLOYEE WITH NAME-CLEARING HEARING? PET. FOR CERT.
21 FILED 8/8/07.

22 SEE ALSO HUDSON V. HARDY, 412 F.2d 1091, 1095 (D.C. CIR. 1968) - JUDGE HAS POWER
23 UNDER RULE 56(f) TO "MAKE SUCH OTHER ORDER AS MAYBE JUST." IT COULD
24 ALSO INCLUDE AN ORDER THAT PRISON OFFICIALS BRING THE PETITIONER TO
25 COURT TO LET HIM TESTIFY ON HIS OWN BEHALF. SEE CRUZ V. BETO, 405
26 U.S. 39, 322 (1972) - A COMPLAINT "SHOULD NOT BE DISMISSED FOR FAILURE TO STATE A
27 CLAIM UNLESS IT APPEARS BEYOND DOUBT THAT THE PLAINTIFF CAN MOVE NO SET OF
28 FACTS IN SUPPORT OF HIS CLAIM WHICH WOULD ENTITLE HIM TO RELIEF."

BURTON, E. W. # 7720
Case 3:08-cv-00325-LAB-POR Document 38 Filed 09/12/2008 Page 8 of 10
P.O. BOX 5246 - CSAT/SP - C1-719C
COR CORAN CA. 93212
IN PRO PER

1.
2. SEE BROWN V. MOORE, 532 U.S. 968, 121 S.Ct. 1598, 149 L.Ed.2d 464 (2001).
3. GRANTING A PRO SE PETITION FOR CERTIORARI, VACATING THE ELEVENTH
4. CIRCUIT'S JUDGMENT DENYING A COA AND REMANDING FOR RECONSIDERATION
5. IN LIGHT OF ARTUZ V. BENNETT, 529 U.S. 1065, 120 S.Ct. 1669, 146 L.Ed.2d 479.
6. (2000); SEE COA STANDARDS SET FORTH IN MILLER-EL V. COCKRELL, 537 U.S. 323,
7. 71 U.S.L.W. 4095 (2003).

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IN PROPER
ARGUMENT

1 A COURT MAY ALSO ADDRESS A PROCEDURALLY DEFECTED
2 CLAIM IF FAILURE TO DO SO WOULD RESULT IN THE
3 CONVICTION OF ONE WHO IS ACTUALLY INNOCENT - *LAGRAND V.
4 STEWARD* (9TH CIR. 1998) 133 F.3d 1253; *SCHLUPIK V. DELO* (1995) 513
5 U.S. 298, 115 S.Ct. 851, 130 L.Ed.2d 806.

6 THERE ARE NO INTERVENING U.S. SUPREME COURT DECISIONS
7 ON POINT OR OTHER INDICATIONS THAT THE STATE COURT
8 WILL CHANGE ITS OPINION. - *SWEET V. COPPA* (9TH CIR. 1981)
9 640 F.2d 233, 236; SEE ALSO *GARDNER V. PITCHESS* (9TH CIR. 1984)
10 731 F.2d 637, 640.

11 STATE REMEDIES EXHAUSTED, NO NEED TO REFILE IN STATE COURT
12 AFTER REVIEW DENIED, *BROWN V. ALLEN* (1953) 344 U.S. 443, 73 S.Ct.
13 397, 97 L.Ed. 469.

14 APPOINTMENT OF COUNSEL IN COMPLEX CASE - SEE 18 U.S.C. § 3008 (E),
15 DILLON V. U.S. (9TH CIR. 1962) 307 F.2d 445, F.A. H.C. RULE 8(C) 28 USC § 1915(d) 2854(h);
16 BASHER V. KISLEY (9TH CIR. 1984) 730 F.2d 1228, F.R.H.C. 6(a); ESKIDEEV, RAY (9TH CIR. 1985) 745 F.2d 1178.

17 EVIDENTIARY HEARING TO SETTLE FACTUAL DISPUTES, TAYLOR

18 V. CARDWELL (9TH CIR. 1978) 579 F.2d 1380

19 PRAYER:

20 WHEREFORE PETITIONER PRAYS FOR THIS HONORABLE U.S. DISTRICT COURT
21 TO GRANT THIS MOTION, FOR A STAY IN HIS FIRST RULE 60(B) MOTION
22 TIMELY FILED ON OR NEAR 5-29-08. AS AEDPA CREATES CONFUSION
23 AND COMPLICATIONS FOR THE UNTRAINED, LAYMAN, PRO SE STATE PRISONER,
24 WITH IT'S LIMITATIONS. PETITIONER HAS RECENTLY BECAME AWARE
25 THAT A PROPERLY FILED RULE 60(B) MOTION SUCH AS HIS, TOLLS
26 AEDPA IN IT'S OWN STATUTES OF 1 YEAR, AND THEREBY ALLOWING
27 AN OTHERWISE DISADVANTAGED PRO SE CITIGAN AN OPPORTUNITY
28 TO PURSUE HIS LEGAL REMEDIES FROM AN INCORRECT RULING
29 OF THE DISTRICT COURT, AND APPEAL IT'S DECISION. THIS MOTION
SHOULD BE GRANTED, AND COUNSEL APPOINTED IN THE INTEREST OF JUSTICE.

I DECLARE THE AFOREMENTIONED IS TRUE AND CORRECT UNDER THE PENALTIES
OF PERJURY, UNDER U.S. LAW. SIGNED: Eric W. Burton #FO2720
ERIC W. BURTON

DATED: 9-4-08

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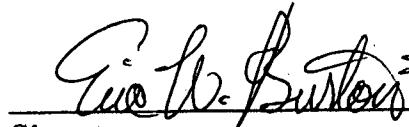
CERTIFICATE OF SERVICE

Case Name: IN RE BURTON ON FEAH C, PETITIONER v. DIRECTOR OF THE C.D.C.R, RESPONDENT

Case No.: 08-cv-0325 LAB (PLR)

IMPORTANT: You must send a copy of ALL documents filed with the court and any attachments to counsel for ALL parties in this case. You must also file a certificate of service with this court telling us that you have done so. You may use this certificate of service as a master copy, fill in the title of the document you are filing and attach it at the back of each filing with the court. Please list below the names and addresses of the parties who were sent a copy of your document and the dates on which they were served. Be sure to sign the statement below. You must attach a copy of the certificate of service to each of the copies and the copy you file with the court.

I certify that a copy of the NOTICE OF CLARIFICATION AND DATE TO FREELY AMEND 1ST TIMELY FILED AND 60(b) MOTION TO ABATE DISMISSAL CONTRA... (4 PAGES) (Name of document you are filing, FILED ON OR NEAR 05-29-08, i.e., opening brief, motion, etc.) PURSUANT TO AA TUZ V. BENNETT 5:08-cv-0145, 28 USC 1746 - BASED ON MEMORANDUM OF POINTS AND AUTHORITIES (SEPARATE DOCUMENT) IN SUPPORT THEREOF (5 PAGES), and any attachments was served, either in person or by mail, on the persons listed below. REQUEST COURT GIVE NOTICE TO ALL PARTIES OF INSTANT ACTION


Eric W. Burton #FO2720
Signature
Notary NOT required

Name
KELLEY A. JOHNSON - ATTORNEY GENERAL
DIRECTOR, C.D.C.R.

Address
KELLEY A. JOHNSON@DOJ.CA.GOV.

Date Served
9-04-08